Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1370

PHILIP JAY FETNER,

Petitioner,

v.

FEDERAL LAND BANK OF BALTIMORE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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Petitioner Philip Jay Fetner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Superior Court of Pennsylvania in the above-entitled case.

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania, not yet reported, appears in the Appendix hereto. The

opinion of the Court of Common Please of Bucks County, also unreported, is reprinted in the Appendix as well.

JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered on September 14, 1979. A timely petition for reargument was denied on January 9, 1980 by the Superior Court. A petition for Allowance of Appeal was denied on December 10, 1979, by the Supreme Court of Pennsylvania, Eastern District. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

QUESTIONS PRESENTED

1. Whether the trial court by its regulation of pre-trial discovery and conduct of the trial itself so abused its discretion as to deny petitioner the due process of law assured by the Constitution of the United States?

2. Whether the loan program of respondent is subject to the anti-fraud and registration provisions of the Federal Securities Act of 1933, as amended, and the Securities Exchange Act of 1934, as amended?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

Fourteenth Amendment

United States Code:

Securities Act of 1933

Securities Exchange Act of 1934

Farm Credit Act of 1971

STATEMENT OF THE CASE

On June 5, 1974, petitioner entered into an Agreement of Sale to purchase a farm in Bucks County, Pennsylvania. Sbusequently thereto, respondent agreed to provide a first mortgage loan and made a number of representations to petitioner concerning the Farm Credit System.

In direct contravention of the Agreement of Sale, the sellers in July of 1974 covertly granted an easement of roads to the Pennsylvania Department of Transportation (PennDot) across the land subject to sale. The deed of easement was not recorded until October 1, 1974. On October 9, 1974, petitioner made settlement on the property. Petitioner was ignorant of the existence of the deed of easement, and a policy of title insurance issued to petitioner insuring him against any defect, lien or encumbrance on the title failed to disclose the recorded easement.

At closing, petitioner executed and delivered a Mortgage Bond to respondent in the principal amount of one hundred seventeen thousand five hundred dollars ($117,500.00). The loan was made through the intermediary of the Southeast Federal Land Bank Association. Every borrower, including petitioner, who obtains such a loan automatically becomes a voting member of said Association, which Association in turn is fully owned by local stockholder members, by purchasing stock or participation certificates equal to five percent of the loan. Thus, on October 9, 1974, petitioner purchased stock in the amount of Five Thousand Eight Hundred Seventy-Five Dollars ($5,875.00).

In the spring of 1975, subsequent to taking possession of the farm, petitioner learned of the easement. At the

same time, PennDot began the construction of a major highway across petitioner's property, destroying a natural border of trees, shrubs and plantings, which severely altered the character and reduced the value of said property. Shortly thereafter, petitioner sued the sellers, the real estate agents, PennDot and Commonwealth Land Title Company for, *inter alia,* fraud and sought, *inter alia,* rescission of the sale.

During subsequent discovery in that case, questions were raised as to the possible complicity of respondent and its local agent acting in concert with the defendants. At the same time, respondent acted in ways contrary to its representations made in 1974 prior to the loan transaction. Lengthy discussions ensued, and petitioner months later stopped mortgage payments.

During subsequent settlement discussions, respondent commenced this action in mortgage foreclosure against petitioner by complaint filed on March 16, 1977. Respondent demanded judgment in the amount of $137,195.45, representing alleged unpaid installments, accelerated principal, default interest, certain real estate taxes and attorney's commission. Petitioner filed Preliminary Objections challenging plaintiff's capacity to sue, demanding a more specific pleading, asking to strike the claim for 10% attorney's fees and seeking a general demurrer. Preliminary Objections were overruled by the Court of June 23, 1977, whereupon petitioner filed an Answer, New Matter and Counterclaim. The Answer specifically denied respondent's allegations. New Matter reiterated the issues of the Preliminary Objections and set forth the stockholder relationship between plaintiff and defendant.

The Counterclaim, consisting of eleven counts, generally alleged that material misrepresentations of

respondent fraudulently induced the mortgage contract, that respondent tortiously harmed petitioner in attempting to cover up the original fraud and force foreclosure and was in breach of the loan contract, and that respondent also had violated the Federal Securities Laws. Petitioner sought rescission of the entire transaction, plus interest and damages.

Respondent filed a responsive pleading thereto in the form of a general denial (Answer) without asserting any further New Matter or raising any objection to the Counterclaim as stated. The issues thus joined, petitioner served upon respondent three sets of Interrogatories. (Respondent took no discovery.) None were answered in a timely fashion; the months' delay went well beyond the time allowed by the Rules of the Court. Moreover, the interrogatories were answered in a most evasive fashion. Documents produced were inaccurate or incomplete (*e.g.,* the Indemnity Agreement produced in response to Question No. 5 of the First Set). Many questions were answered simply "not applicable," or "none." Attempts to get at the substance of the transaction were met with the answers that the people involved were not "employees" of plaintiff (they were, in fact, employees of plaintiff's agent) or similar tactics of applying technical status identification to avoid answering the questions.

At one point (Answer No. 4 to the Third Set), plaintiff even declared that "there is no relationship between Russell Albright and The Federal Land Bank of Baltimore," quite an assertion in view of the fact that Albright was employed by the Norristown Federal Land Bank Association (later changed to "Southeastern Federal Land Bank Association"), which was both an owner and agent of the plaintiff.

Other answers appeared on their face to be falsehoods (such as plaintiff mortgagee did not receive the preliminary title report or the property survey) and were in fact directly contradicted by later testimony of plaintiff's agent. Counsel for the petitioner immediately telephoned and wrote plaintiff's counsel pointing out deficiencies and asking that they be corrected without the necessity of a Motions for Sanctions. No reply was ever received. Moreover, it should be emphasized that the entire Third Set was sent because of respondent's failure to answer adequately the prior two.

Based upon the "answers" to the First set, petitioner sent to respondent a list of five individuals, all employees of plaintiff-respondent or its agent, as proposed witnesses of whom he intended to take depositions. Recognizing the business nature of the witnesses and in some instances their distance from Bucks County, petitioner asked for alternative dates so that depositions would be taken at mutually convenient times. In fairly reviewing the "jockeying" that followed between counsel, two conclusions can be reached: on the one hand, counsel for petitioner attempted to do everything possible to satisfy the scheduling problems raised by respondent, while, on the other hand, respondent's counsel resorted to a posture of utter non-cooperation. Initially refusing to produce the witnesses, he later insisted that depositions be taken only in Baltimore, Maryland, and at the sole convenience of plaintiff's employees.

While this discussion as to depositions and the adequacy of answers to Interrogatories continued, plaintiff filed a Motion, under the affidavit of plaintiff's counsel, averring that discovery was not complete but requesting that the Court limit the time of discovery and thereafter set a hearing date. Paragraph 6 of said Motion stated:

> The Defendant has pursued a great deal of discovery and intends to take deposition of various officers of the Defendant [*sic*]. At the time of this Motion all discovery has not been completed by the Defendant. Plaintiff is willing to participate in reasonable discovery proceedings.

Paragraphs 8 and 9 read:

> Plaintiff believes that because of protracted discovery proceedings by the Defendant, the setting of a hearing date under normal court procedures will cause an unnecessary delay.
>
> Plaintiff requests a hearing date be scheduled at the present time rather than waiting for completion of discovery.

It is worth emphasizing at this point that so-called "protracted discovery" at this time amounted to some seven pages of widely spaced answers to Interrogatories that would take a person of average intelligence no more than five minutes to read. One of these pages, for example, repeated the phrase "Not applicable" four times (triple-spaced) and the word "None" nine times (double-spaced). And, again, the Third Set of Interrogatories was simply an attempt to get plaintiff to answer the First Set.

To this Motion, counsel for the defendant sent a letter to counsel for plaintiff and to the Court Administrator advising that several "facts" set forth in the Motion were disputed and that the matter was hardly ripe for a hearing. No disposition was made of this Motion. Unaccountably and shortly thereafter, without any praecipe being filed, counsel for plaintiff filed another motion indicating that discovery was now complete and requesting a trial date. Plaintiff was well aware of the disputed averments of the Motion, yet did not proceed

by Petition and Rule Returnable. A second letter of protest was dispatched by defendant's counsel. Equally unaccountable, the Court then quickly set a trial date a few weeks away.

Defendant thereafter filed a Motion for Sanctions. This Motion was never disposed of.

Prior to the hearing date, at the request of counsel for the defendant, a conference was held with the trial judge, and a Petition To Strike the matter from the trial list was handed up. No Rule Returnable was set and no disposition of the Petition was made. The Court ordered instead that the parties engage in good faith discovery over the next week, that is, the week that preceded the trial, and further permitted the deposition of only two parties, Russell Albright and Richard Carpenter.

The deposition of Albright began on the following Monday. On that day, a severe blizzard, one of the worst in Bucks County history, hit the area, and the Court House was closed at approximately 12:30 p.m. and the deposition postponed. The Court House was closed the next day, Tuesday, while the area struggled to recover from the storm. On Wednesday, the deposition of Albright was resumed. Unfortunately, it had to be interrupted so that the deposition of Richard Carpenter could begin—Wednesday being the only day that Mr. Carpenter, who had travelled from Baltimore, was to be made available. The deposition of Carpenter was only partially completed. Informal contract with the trial judge indicated that the trial would proceed whatever the results of the deposition process. On Thursday, the deposition of Russell Albright was substantially concluded. At the close of Albright's deposition, counsel for plaintiff indicated that he would supply a copy of a certain document (the appraisal report) in

plaintiff's possession to counsel for defendant on Friday afternoon.

On Friday afternoon, respondent's counsel refused to supply the promised documents.

No transcripts of the depositions were made available prior to the trial. At the time of trial, a Petition to Strike the matter from the list and a Motion for a Continuance were presented to the Court by petitioner. Both were refused.

During the course of the trial, held on February 15, 1978 without jury before Judge John J. Bodley, the Court made numerous evidentiary rulings contravening the rules of civil procedure, refused to permit complete cross-examination of witnesses, and refused to permit testimony in support of the pleadings advanced by petitioner in the Answer, New Matter and Counterclaim. Indeed, no evidence on the Counterclaim was allowed at all. Petitioner was ordered from the stand in mid-testimony, whereupon the Court abruptly entered judgment. Counsel was not permitted to make any final argument.

The trial judge simply viewed the case as a "straightforward mortgage foreclosure"—time and again, reference was made to this theme and to some inability by petitioner to make mortgage payments, an assumption that was never pleaded nor as to which was a single word of evidence offered:

> "You know as well as I do that you [Defense Counsel] and I would not live in our homes if we did not pay our mortgage payments since last July of '76." [Trial Transcript, p. 105, lines 14-17.]

". . . he can't live on this place and enjoy the property without paying for it, and he hasn't paid for it." [Trial Transcript, p. 107, lines 23-25.]

"It's somebody else's money that's being used to permit him being there, not his." [TT, p. 108, lines 22-23.]

Interrupting the *first* witness for the defense:

"I have given you [Defense Counsel] the opportunity to establish this so-called fraud or fraudulent inducement, and you haven't done it, *and you're not going to do it.*" [TT, p. 109, lines 12-15.] [Emphasis added.]

and

"If I were to do anything more than to speak bluntly to you about this situation, I just wouldn't be fair to myself, because I don't believe in going through motions where there is no merit in something." [TT, p. 109, lines 16-20.]

Indeed, as Judge Bodley stated in his opinion:

"It should be added, gratuitously, that had Plaintiff submitted a motion for a summary judgment upon the pleadings prior to the trial, it would have been granted forthwith." [p. 11]

"Does it matter how much a man, who cannot make his mortgage payments, tries to put off foreclosure?" [TT, p. 146, lines 20-22.]

"I don't like hypocrisy. I find it all through that Answer and New Matter. . . . I see a mortgagor who has been unable to meet his payments. I'm sorry for him." [TT, p. 158, lines 3-4.]

"This is a financial institution that probably loaned him more than they should have loaned him, as it turns out. It is unfortunate for all parties." [TT, p. 158.]

It must ruefully be admitted that petitioner-defendant inadvertently fueled Judge Bodley's prejudices. In an attempt to show one element of the fraudulent inducement or, alternatively, breach of the mortgage contract, defendant introduced evidence concerning an earlier period when, confronted with certain financial difficulties, he was denied the much stressed leniency that formed a cornerstone in the Land Bank's mortgage inducement. The distinction between that time, which ended when defendant paid all arrearages pursuant to an agreed upon workout arrangement, and the period after July 1976 was, however, lost upon the trial judge.

On page 155 of the Trial Transcript occurs the following exchange, in which defense counsel tries to establish the events surrounding the *earlier* workout arrangement:

[Mr. Beckert] Did you [Defendant] ask Mr. Albright whether the payments could be extended beyond the March deadline?

[Mr. Hershenson] I object.

[Court] Sustained. Of course he asked right up until the date of foreclosure, I suppose.

This remark illustrates well the problem of this trial. "Of course," there was no such testimony indicating anything of the kind—neither at trial nor during discovery—and nothing in the pleadings so to indicate. Quite the contrary.

Timely exceptions were filed with the Court en banc. By decision dated September 8, 1978, Judge Bodley, writing for the Court, dismissed the exceptions.

At no time did the Court address the Federal Securities Law question raised. The Opinion is reproduced in the Appendix.

Petitioner posted security and appealed. The appellate court in essence refused to interfere with the discretion exercised by the lower court. (The Opinion is reproduced in the Appendix.) A number of issues were not even addressed by the Superior Court, among them the Federal Securities Law questions. Petition to reargue was denied. Allocatur to the Pennsylvania Supreme Court was refused.

REASONS FOR GRANTING THE WRIT

DUE PROCESS

At the outset, it must be admitted that due process claims in civil cases do not have the same glamour as their criminal counterparts. That may be unfortunate for petitioner, given the fact that his home, substantial sums of money and several years of endeavor are directly involved. Nevertheless, petitioner is willing to assume a heavier burden in demonstrating the importance of this case: to allow the abuse of discretion shown here to stand would give a trial judge, any trial judge, sitting without a jury, the right to exercise virtual dictatorial powers, unfettered by the basic safeguards of our civil process.

Furthermore, what perhaps is difficult to convey simply from reading the record was the harassing, sarcastic and injudicious tone used throughout by the trial judge. And not all the offensive remarks from the bench, including *sub votto* asides, were recorded in the transcript. In the aggregate, defense counsel was placed under considerable strain in attempting intelligently to pursue his case.

In order to place the necessity for fair discovery in this case in its proper context, it should be emphasized

that this was in large part a fraud case. The Counterclaim alleged throughout that plaintiff had knowingly participated in a fraud upon defendant and that, when defendant suspected or discovered the fraud, employees of plaintiff had sought to force foreclosure in bad faith in an attempt to moot possible liability for the fraud. Fraud is difficult to prove in any case but ever more so when a corporation, bank or other institution is involved. Numerous diverse matters, documents, statements and the like would normally be required to challenge the "party line." Institutions and/or their agents can be expected to proceed with some sophistication and draw the wagons in a tight circle. What might seem routine or be alleged as routine may appear wholly different in its proper context if the internal workings of the institution and its paper work were understood. Moreover, the case also involved securities law questions, and the relationship of the various components of the Land Bank system to each other and to the defendant were of crucial significance.

It should, moreover, not be necessary to note that discovery need not be absolutely related directly to a relevant fact but would be appropriate if it could lead to probative information. And this case is vritually a textbook example of the need for intelligent and thorough discovery.

Counsel is aware of the very real and necessary concern in the legal community that the discovery process is now being overused. Wild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be all too common. Unnecessary intrusions into privacy, high costs, and the unfair use of the discovery process as a lever for settlement have come to be part of some lawyers' trial strategy.

In no sense, however, was the discovery sought here by defendant even remotely a fishing expedition. For example, all the questions asked during depositions laregely met without objection, went directly to the Complaint and Answer, New Matter and Counterclaim. Every attempt was made to promote the early identification of issues in a potentially complex litigation both to reduce the cost of discovery and to expedite litigation.

Discovery allowed in this case was, however, a sham. Plaintiff successfully answered Interrogatories in manifestly bad faith, obscuring the identity of witnesses, documents and relevant transactions and repeatedly ignoring the plain meaning of the questions. Plaintiff successfully blocked depositions by filing inconsistent, under affidavit of counsel, Motions, proceeding by Motions rather than Petition and Rule in violationg of the express provisions of the local Rules of Court. Even the briefest perusal of the allowed deposition transcripts will show that Albright frequently resorted to "stonewalling," incredible lapses of memory about the most basic aspects of his job (including such matters as the limits of his discretionary authority), and to pleading ignorance of the most elemental facts. At one point, he even went so far as to say that he simply could not tell what the "Farm Credit Service" was, although his picture appeared under that caption in a bimonthly publication prepared by his employer and the phrase also appeared on his own stationery. Predictably, the testimony indicated the need to depose others, in particular Albright's immediate superior, Herbert Kratz.

Richard Carpenter, for his part, was totally unresponsive, to the point where it may be seriously questioned whether counsel for plaintiff did not knowingly mislead the Court during the conference that preceded ordering

the truncated depositions where he made several representations as to the competence and appropriateness of deposing Carpenter (to the exclusion of other officers or employees of plaintiff). Much of Carpenter's testimony related as to how the questions asked were better directed to others! At the very best, his testimony indicated the wisdom of seeking originally to depose the five employees of plaintiff or its agent already mentioned. And, predictably, plaintiff's counsel during the deposition process was less than cooperative—even to the point of breaking a promise made to produce certain records.

The original injustice of limiting drastically defendant's discovery was compounded time and again as the seemingly inexorable trial date approached. Only maximum cooperation by plaintiff would have proved even remotely satisfactory in such a brief period. Although the Court did not have the transcripts to rule on the Motion for Continuance presented at the trial, there was nothing in the history of the case to suggest that such cooperation would be forthcoming. To the contrary, the entire course of conduct by plaintiff showed that it feared and did everything to prevent any sort of good faith discovery. And the plain fact was that the weather prevented the deposition from being concluded.

While it may readily be admitted that the trial judge has wide discretion in ruling on such a Motion, can it be doubted that the discretion was manifestly abused here? In light of Judge Bodley's view of this case, is there any doubt that had the weather cancelled the depositions altogether the trial would still have proceeded? The lack of transcripts (a partial transcript was provided during the luncheon recess, *see* TT, pp. 24-25) were brushed aside by the Court at the opening of the trial as meaningless.

That the events of the trial challenge all semblance of fairness and judicial propriety is an understatement.

Petitioner's first set of interrogatories to respondent requested, under Interrogatory No. 11, the name and address of all witnesses whom respondent planned to call at the trial of this matter. Respondent-plaintiff responded as follows: "Unascertainable at this time. Plaintiff will furnish Defendant with a list of witnesses when ascertained." No supplemental answer was ever filed listing said witnesses, nor was this ever done informally. Plaintiff's counsel called two witnesses to the stand, and defendant objected based upon this failure to disclose. Said objections were brushed aside by the Court, in clear violation of current procedural practice.

The seminal case on this point is *Nissley v. Pennsylvania Railroad Company*, 435 Pa. 503 (1969). In ruling that a surprise witness could not testify even when the interrogatory requesting the name of witnesses was overbroad, the Court stated in part:

> The several revolutions which have occurred in the field of procedure, insofar as they relate to problems of pre-trial discovery, have had as their principal focus the desire that a case should be an inquiry into the facts of the case with each party in a position to examine the evidence upon which a decision will rest. We have moved away from what was described as the "sporting theory of justice" and have embraced a theory of wide ranging and mutual discovery. One advantage of discovery is the protection it gives the adversary against surprise evidence which can be proven false or which can be put in a truer or less damaging light if there is opportunity to investigate the matter and produce rebutting or qualifying facts.

435 Pa. at 507.

The *Nissley* decision has been followed recently in the matter of *Moore v. Howard P. Foley Company*, 340 A.2d 519 (1975).

In the case before us, especially as to the witnesses John R. Wright, respondent's sole explanation was that Mr. Wright was unknown to them as a witness until just prior to the date of trial! But Mr. Wright is the Manager of Data Services for the computer company employed by respondent. This is not a matter of an unknown witness suddenly appearing, but of respondent simply refusing to disclose his name prior to trial. Such strategy does not permit defendant any opportunity to depose said witness, for example, to understand the manner in which plaintiff's books were kept to determine whether they were accurate in light of the testimony offered by this witness.

The first witness testified to the nature of the Federal Land Bank of Baltimore as an "instrumentality" of the Federal government. The importance of this question and the self-serving character of the testimony is beyond doubt. When petitioner on cross-examination sought to question this concept, Judge Bodley declared that beyond the scope of cross-examination and a matter which ought to be presented by way of defense (TT, p. 12). Plaintiff's steady stream of objections to any questions dealing with the nature of the Farm Credit system were sustained. (Subsequently, however, when defendant tried to introduce the subject by way of direct testimony in defense, the Court ruled it out of order!) What sort of information was given to the public through published brochures, the Bank's functioning as a private corporation, whether it actually received any money from the Federal government—all this and more were not permitted.

The second witness introduced by plaintiff testified as to the procedures and accuracy of the billing system (both challenged by defendant in his responsive pleadings). He sought to establish the amounts and character of the alleged defaults but admitted that neither he nor his organization (a regional computer service) had any way of knowing if these amounts actually belonged to defendant or his property except as reported by plaintiff (TT, pp. 22-23, 27). The computer service was merely mechanical and the accuracy of their records depended entirely upon information supplied by the local Federal Land Bank Association (TT, pp. 30ff).

Defendant's attempt to show errors in computation was not allowed by Judge Bodley as having "nothing to do with default or no default" (TT, p. 43). The Court's view was that in the face of "default"—*i.e.*, a computer record of non-payment—nothing further need be said, not even as to the particular figures which were stated as those upon which the default was alleged to have been predicated. The Judge even went so far as to state that defendant "acknowledged default" (TT, p. 44, lines 8-9), which was absolutely false as a reading of the pleadings and testimony will readily show.

In the middle of cross-examination, Judge Bodley simply excused the witness (TT, p. 46). Whereupon, plaintiff rested his case.

Defendant called Albright "as on cross" and proceeded to attempt to prove the misrepresentations that arguably gave rise to fraudulent inducement. Whereupon, the Court sustained all objections to relevant matters: how Albright represented the Land Bank system to defendant and what was told defendant in discussions with Albright. "Let us get to the fraud" (TT, p. 59) became the battle-cry of the Judge, but his bias that the entire hearing was

a waste of time became a self-fulfilling prophecy when he refused to allow any questions that went to what Albright actually said or did. At one point, Judge Bodley went so far as to say: "whatever representation was made, it would not amount to fraud." (TT, p. 62, lines 24-25). Furthermore, the Court permitted no testimony on any matters after the settlement date.

Albright was also excused by the Court in the middle of cross-examination.

The Court's rulings as to cross-examination cannot be justified under even the most stringent view of that aspect of trial practice. Cross-examination is appropriate to elicit the circumstances that would explain direct testimony, to impeach credibility or show bias, or to test the witness's knowledge or recollection of matters. *See, e.g., Kaplan v. Loer,* 327 Pa. 465 (1937); *Valentine v. Federal Insurance Company,* 111 Pa. Superior 311 (1934). Moreover, at several points, the Court, always condescendingly, suggested to counsel for defendant a manner of cross-examining these witnesses. Matters of credibility and fraud are particularly difficult to deal with in terms of a corporate organization. Neither can be discovered or fully documented in a trial where the witnesses who are to be cross-examined know that the judge has taken the attitude that the likelihood of fraud is non-existent and that he is not going to permit any sort of cross-examination into the matters in question. The method of cross-examination is not really a matter of evidentiary proceedings, but more a matter of trial strategy and tactics. That, as well, was limited by the Court, even where the substance of the matters to be pursued was apparently unobjectionable.

When Defendant was put on the stand, the trial judge made it impossible for him to tell the facts of the

dispute. Defendant was not allowed to testify as to conversations with Albright. And all contacts between the Land Bank and petitioner after settlement were foreclosed (TT, p. 138). The Court then went on to rule that it would permit no evidence to be introduced on the Counterclaim, a ruling that also negatively affected petitioner's defense of the Complaint, since several of the issues raised in the Counterclaim and New Matter related specifically to the defense of the claim. The Court even declared that it was irrelevant that the Counterclaim was not challenged by way of Preliminary Objections—"a very sensible decision on the part of plaintiff's counsel in order to get the matter disposed of" (TT, p. 161, lines 23-25).

It is submitted that all such evidence, if testimony were permitted thereon, would have been of a character which, if accepted and believed, would have established a cause of action against the plaintiff on behalf of the defendant.

The hearing ended rather dramatically: without much further ado, the Court ordered defendant to step down, threatened defendant with contempt when he [confused] hesitated, foreclosed all other questioning, lectured defendant and his counsel and accused them of not believing their own defense (TT, p. 160) and attempting to "kid" him (TT, p. 162). He ordered judgment for plaintiff, not permitting counsel at any time to make final argument on any matters of law or law and fact.

There can be no doubt that a trial court has general and wide authority to conduct an actual trial; that authority is necessary at the least to preserve order and decorum. Nonetheless, the basis of our system of justice and our adversary proceeding is the right of cross-examination. That right, apart from the question of

any evidentiary rulings made, was denied petitioner by dismissing witnesses before the conclusion of their cross-examination. The Court made no justification for these rulings, nor explained them in any way. Rather, it merely dismissed those witnesses over the objection of counsel. It is difficult to understand how an adversary hearing can be held if such a position is tolerated.

Moreover, the refusal to permit defendant to complete his own testimony is perhaps the most inexcusable of all. In the middle of the defendant's testimony, when he stated that he believe that he was not actually in default, to force him to leave the stand and to allow him to say nothing further on his own behalf, and then to refuse an additional testimony that might have been offered on defendant's behalf, totally usurped from counsel and totally denied the defendant the right to a full and complete hearing. No amount of discretion could possibly permit such a standard. To allow such conduct would permit any trail court, sitting without a jury, at any time, to excuse any witness or exclude consideration of any other testimony without knowing the nature of that testimony and to decide the case in the ensuing vacuum.

The Court also foreclosed entirely the right to present final argument. While, in a trial before a judge only, the right of final argument is not absolute, in a case where the pleadings raised substantive legal issues, as here, it would be extraordinary were not the right to conclude offered. The conclusion of this trial speaks for itself.

Due process has perhaps been most eloquently described by Daniel Webster as "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." It is that fundamental standard which regretfully petitioner must submit was

not adhered to in this case. As early as page 2 of the transcript and certainly by page 3, the Court was apparently taking the position that the proceedings were merely an exercise in futility. As the trial progressed, it was abundantly clear that in terms of an orderly disposition of the matter, there were not two adverse parties and a disinterested trier of fact, but a trier of fact who throughout the case seemed to indicate that the matter had already been resolved. For example, beginning on page 103, the Court purported to sum up a stream of facts, some of which are simply non-existent in the record and some of which the Court apparently inferred from the pleadings or some other source, which led to the conclusion that, irrespective of the pleadings and irrespective of the fact that testimony had hardly been completed, it had foreclosed the weighing of any further evidence and had purely and simply decided the matter at issue. It would be hard to imagine a situation more violative of the notion of judgment only after trial.

Moreover, it is submitted, that what we find here is perhaps more harmful where the judge is also the trier of fact than where he is merely presiding over a jury trial. As was stated by the Superior Court in *Commonwealth v. Harrison*, 228 Pa. Superior 412, 323 A.2d 72-24 (1974):

> Although the cases dealing with a trial Judge's conduct generally involve jury trials, the principle they express cannot be limited to jury trials. If anything, it is more compelling in a non-jury trial. If it is ground for a new trial, that a Judge has conducted himself in such a way as might influence the jury to render a decision that is not impartial, it certainly is ground for a new trial when a Judge

> sitting as a jury demonstrates that he is, in fact, not impartial . . . .

After this matter was argued before the Superior Court, the Commonwealth Court decided *Veneziale v. Raudenbush*, ___ Pa. Commonwealth ___, 402 A.2d 295 (1979). At a preliminary injunction hearing before the *same* trial judge, Judge Bodley, sitting as Chancellor in Equity, the Court did not permit cross-examination or allow the defendants to testify. The Commonwealth quickly overruled:

> "Whether or not Appellants' position was 'illegal, unjust and unconscionable,' as the Chancellor found, the Appellants were nevertheless entitled to a fair hearing which encompasses at the very least the right to cross-examine witnesses and present testimony.'" [p. 296]

Moreover, the latitude of a Chancellor, given his broadest equitable powers, exceeds that of a judge sitting without a jury in a civil case.

FEDERAL SECURITIES LAW

Each Federal Land Bank is made up of Associations. Its loans are made through the Associations servicing the territory in which the real estate offered by the applicant is located. These Associations are private cooperatives, owned by the borrowers, who are farmers, ranchers and owners of rural homes. Each Association, and the Southeast Federal Land Bank Association here was no different, solicits, promotes, services and generally provides information relating to the advantages and different aspects of the Farm Credit system.

Although the matter was squarely established by the pleadings, the trial court refused time and again to consider whether the Federal Securities Laws were applicable and no evidence thereon was permitted at trial. The petitioner directly raised the issue of the

applicability of the Federal Securities Laws at every stage of the appellate process. Nevertheless, the appellate courts unaccountably ignored the issue altogether.

Counsel for respondent apparently agreed (in briefs) that the sale of a "security" as understood by the 1933 Act is involved, that the Association/Land Bank is an "issuer" and/or "controlling person" under the Act, and that petitioner is a "purchaser." Stock in the Association, which in turn owns and is supervised by the Land Bank, is issued on the gross amount of the mortgage at the rate of 5% of value—that is, the borrower purchases a $5 share for every $100 borrowed. The argument made by plaintiff's counsel was that respondent was a "federally chartered instrumentality of the United States" and is therefore exempt from the 1933 Act requirements under Section 3(a)(2). That Section reads in part "any security issued or guaranteed by the United States . . . or by any person controlled or supervised by *and* acting as an instrumentality of the Government of the United States . . ." is exempt (emphasis added).

In the first place, it may be readily conceded that the Farm Credit System Act states that the land banks "shall continue as federally chartered instrumentalities of the United States" (12 U.S.C.A. § 2011). Moreover, it is also true that the statute provided that each land bank is subject to the supervision by the Farm Credit Administration, which is an independent agency of the executive branch of the Federal government. That does not settle the question, however.

The Supreme Court has repeatedly held that exemptions from a regulatory statute are to be strictly construed and that the burden of proof rests upon the party who claims the exemption. *Securities and Exchange Commission v. Ralston Purina,* 334 U.S. 37, 44-45 (1948); *Spokane & Inland Empire Railroad*

Company v. United States, 241 U.S. 344, 350 (1916). Furthermore, and most importantly, in determining whether a corporation is entitled to such an exemption, the character of business actually done by the corporation controls, not its name or charter powers. *Bowers v. Lawyers Mortgage Co.,* 285 U.S. 182, 188; *Securities and Exchange Commission v. American International Savings and Loan Association,* 199 F. Supp. 341, 347 (1961).

The issuer in this case is an association that functions as a private cooperative. There was a plethora of information available from deposition that respondent and its agent-owner at every opportunity emphasized the private nature of the system. An interview with Russell Albright that appeared in a magazine was introduced at depositions. A quotation from that article was as follows: "Farmers and land owners still confuse Albright's giant multimillion dollar Farm Credit Service, a private cooperative (owned by its shareholders and borrowers) with the Farm Home Association (FHA), a government-owned agency." (*See* Deposition of Russell Albright, p. 25). Albright admitted in deposition that he told defendant that the lender was a private cooperative and not a governmental entity, and that the United States government did not guarantee the obligations of plaintiff (its bonds, etc.). Moreover, the record will show that not only is plaintiff represented by a private attorney in this suit, but the mortgages and bonds of the Federal Land Bank of Baltimore are prepared by private attorneys as well.

Moreover, it has always been clear (*see* Rule 131 under the 1933 Act and Rule 3b-5 under the 1934 Act) that any part of an obligation issued in the name of a government or governmental instrumentality which is payable from funds generated by a private enterprise is

a non-exempt security within the meaning of the 1933 Act. Thus, Congress in 1970 changed the law specifically to exempt industrial revenue bonds.*

Respondent admitted in deposition that it had never received a specific exemption or opinion from the SEC nor has it ever registered its securities or furnished prospectuses to purchasers in connection with a sale.

But the most important consideration at this point is that petitioner was prevented in discovery and at trial from testing respondent's contention in this regard and from building a record sufficient to prove that the system actually operates as a private entity and therefore its securities are non-exempt. Indeed, a reading of the answers to Interrogatories and the deposition transcript shows that discovery in this area was what respondent feared most.

Petitioner contends that it can be shown that the Farm Credit System has changed drastically from its start

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*In fact, the exemption most nearly in point is that provided by Section 3(a)(5)(A), which refers to securities issued by a ". . . cooperative bank, homestead association, or similar institution . . . ." This Section is important because basic rules of statutory construction do not ordinarily allow for overlapping exemptions—if an issuer falls without an exemption designed for him "but for . . .," he would normally be foreclosed from stating that the relevant test was irrelevant because the exemption was co-opted by another exemption. The Section 3(a)(5)(A) exemption is unavailable because the issuer here takes from the total amount paid or deposited by the purchaser ("by means of any fee, cash value or other device whatsoever, either upon termination of the investment at maturity or before maturity") an aggregate amount in excess of 3 percent of the face value of security. Simple math will show that this is so: the interest charged on the loan is charged the $5 shares as well (that is, the interest is charged on the total amount of the loan); a pro rata computation over the life of the loan well exceeds three percent.

in 1966, when it was capitalized and tightly scrutinized by the U.S. government, to the essentially private, self-sustaining system that it is today, a more or less standard lending operation that is owned 100% by its borrowers. There is good reason why Congress would make the non-disruptive declaration that the prior federally chartered Land Banks should continue. It is quite another matter to hide behind that designation for Federal Securities Law purposes. Moreover, it is critical to recognize that the class of people who borrow from the Land Banks—farmers and the like—are precisely the type of investors who are entitled to and need the disclosure protection provided by the Federal Securities Laws.

Petitioner's denial here had other repercussions as well. Failure to register and furnish a prospectus are grounds for rescission. But whether or not petitioner is entitled to rely on Section 3(a)(2), that section does *not* exempt any security from the antifraud provisions of Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 thereunder. But exclusive jurisdiction for Section 10(b) actions rest in the federal courts (1934 Act, Section 27). Consequently, had adequate discovery indicated the applicability of Section 3(a)(2) of the 1933 Act, defendant may have been expected to sue in Federal Court, an avenue that may or may not now be foreclosed by the applicable statute of limitations.

Another antifraud protection is still provided by Sections 12(2) and 17(a) of the 1933 Act, which encourage state court jurisdiction (*see* Section 22(a)). And proof of reliance by defendant upon a false or misleading statement or omission is not necessary to rescind. Counts I and VIII of the Counterclaim state in essence that respondent knew of a material fact, knew it to be material, knew petitioner was ignorant of it and did not

inform him of said fact and may even have conspired with the seller of the property, the title company, the real estate agents, and/or PennDot in keeping the matter from petitioner. The limited discovery permitted suggests strongly that the allegations of Counts I and VIII are true.

The Trial Court cited *Kornicki v. Abrams*, 28 Bucks Co. L. Rep. 215, 218 (1976), for the proposition that a mortgagee has no duty to inspect mortgaged premises for the protection of the mortgagor. What this has to do with the case at hand escapes petitioner altogether. The fraud issue is whether, *knowing* of the easement—knowing of a fact that would have kept petitioner from buying the property and borrowing money from respondent (thereby purchasing a security)—there was a duty to disclose.

CONCLUSION

The issues of due process presented by this case are substantial. The applicability of the Federal Securities Laws is an equally important question. For the reasons set forth, this Petition for Certiorari should be granted.

Respectfully submitted,

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March 6, 1980

APPENDIX

APPENDIX A

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT
OCTOBER TERM, 1978

No. 2096

[Filed: Sept. 14, 1979]

J. 192/1979

FEDERAL LAND BANK OF BALTIMORE,
Appellee,

v.

PHILIP JAY FETNER,
Appellant.

APPEAL FROM THE JUDGMENT OF THE COURT OF COMMON PLEAS OF BUCKS COUNTY, CIVIL ACTION-LAW, AT NO. 77-2577-04

Before: VAN DER VOORT, HESTER and WIEAND, JJ.

OPINION BY VAN DER VOORT, J.

This is an appeal from a decision of the Court of Common Pleas of Bucks County, sitting without a jury, in a mortgage foreclosure actions, in favor of the plaintiff/appellee, Federal Land Bank of Baltimore

(hereinafter, the Bank) and against defendant/appellant, Philip Jay Fetner (hereinafter, appellant or Fetner), in the sum of $137,194.45, plus interest and costs of foreclosure. Counterclaims by the appellant were dismissed. Appellant appeals both from the judgment against him and the dismissal of his Counterclaims.

The Bank's Complaint alleged that on October 9, 1974, Fetner borrowed the sum of $117,500 from it, secured by a mortgage of some twenty-five acres of improved land located in Nockamixon Township, Bucks County. The Complaint alleged that Fetner defaulted on the mortgage by failing to pay some $8,106.36 in monthly installments due from July 1, 1976 to February 1, 1977 and by failing to pay real estate taxes in the amount of $1,659.16. The Complaint recited that as a result of these defaults, the Bank was exercising its right to acceleration under the terms of the mortgage. Judgment was demanded for unmatured principal, monthly installments due, interest, real estate taxes and attorney's commission, totalling $137,195.45.

Fetner filed Preliminary Objections to the Bank's Complaint which were dismissed after briefs were submitted. He then filed a 169-paragraph document which included his Answer, New Matter and numerous Counterclaims. The Counterclaims consisted of eleven counts and sought aggregate damages, compensatory and punitive, in excess of $5,000,000.

The Bank's claim that appellant was in default in his mortgage payments was established by undisputed evidence. In appellant's Answer, he claimed to have made a $2,000 payment for which he was not given credit, but he offered no proof in support of this averment. In any event, this would not have cured the default which has continued since July 1, 1976.

Appellant has averred that the provision for a 10% counsel fee in the mortgage bond is unconscionable. The test of such a fee must be its reasonableness, determined by the circumstances of each case. As this court said in *Foulke v. Hatfield Fair Grounds Bazaar, Inc.*, 196 Pa. Superior Ct. 155, 160, 173 A.2d 703 (1969):

> The mortgagee, having loaned a fixed sum of money should recover both principal and interest without diminution for expenses which he may be forced to pay.

Certainly the circumstances of this case, involving preliminary objections, briefs, depositions, a trial and this appeal, each involving many of the issues tendered by the appellant in his Counterclaims make a fee of 10% of the mortgage quite reasonable, and probably not fully compensatory for the Bank's legal expenses. There was no other challenge to the amount of the judgment on foreclosure.

There remain for consideration the many issues raised in appellant's Counterclaims. Counterclaims are limited by Rule 1148 of the Pa. R.C.P. to those "which arise from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff's cause of action arose". The Counterclaim must have been a part of or incident to the creation of the mortgage itself, and this is to be read narrowly. *Mellon Bank N.A. v. Joseph*, ___ Pa. Superior Ct. ___, ___ A.2d ___ (June 27, 1979).

So tested, those which met the requirement of the rule amounted to averments that the Bank was guilty of fraud in the inducement of the mortgage. Averments in support of this claim of fraud were: (1) that Penn DOT had obtained an easement over a portion of the mortgaged property which was not disclosed to the appellant

at or before the time of closing; (2) that appellant had been promised 80% mortgage financing which he did not receive; and (3) that appellant had been promised "lenient" treatment if he fell behind in his payments, but foreclosure followed a second default.

The background from which these allegations emerge is the negotiation between the appellant and Russell Albright, the local manager of the New Britain Branch of the Southeast Association, an organization which procured loan applications for submission to the Bank. Appellant testified that he told Albright that he had located a "gentleman's country estate and horse farm" on which he planned to sign an agreement to purchase in June, 1974. The purchase price was to be $180,000 and appellant requested 80% financing. Albright is said to have replied that he would recommend such a loan and that his recommendations had not been turned down by the Bank as yet. He did not say that he had authority to approve the loan.

At or about the same time, appellant, who is a lawyer, authorized a title search and in due course a preliminary title report was delivered to Albright which did not show the easement to Penn DOT. It was created at a later date and place on record on October 1, 1974.

The closing took place on October 9, 1974 at which time the appellant executed the bond and mortgage in favor of the Bank as security for a loan of $117,000, the maximum the Bank would lend. He signed the documents and received the proceeds at that time. A final title report was on hand at the time of the closing which showed the Penn DOT easement. This would appear to have been available to all parties at the closing, including the appellant, but it does not appear that he

read it. There is no evidence that he did not understand the terms of the bond and mortgage.

In November, 1974, appellant lost his job and fell behind in his mortgage payments. The Bank threatened foreclosure but did not do so, and by March 1976 appellant became current in his payments. However, he did not pay the 1975-1976 school taxes on the property, and the Bank did so pursuant to authority vested in it under the terms of the mortgage. Appellant again fell behind in his monthly payments on July 1, 1976, and has made no payments since that date, although he has continued to occupy the property.

Attached to the appellant's Counterclaims were copies of Complaints filed against the sellers of the property, the estate of his real estate broker, two title insurance companies and Penn DOT, averring misrepresentations and fraud in the sale of the property, most of which are repeated in his Counterclaim against the Bank.

We deal first with the appellant's claim that the Bank fraudulently withheld from him knowledge of the fact that Penn DOT had obtained an easement over a portion of the property nine days before the closing. At the time appellant talked to Albright, the preliminary title report, which was then available, did not include the easement because it had then not been created. Appellant does not claim that the Bank or Albright reported to him that no easement existed; he simply contends that the Bank had a duty to tell him that the title report showed an easement in Penn DOT.

There is no basis for appellant's conclusion that the Bank or its mortgage procuring agent had any duty to search out defects in the title and disclose them to the appellant. Ordinarily, the relationship between the borrower and lender does not create a confidential

relationship, *Grace et ux v. Moll,* 285 Pa. 353, 355, 132 A. 171 (1926), and none was shown to exist in this case.

An action based upon concealment will not lie, even as between a vendor and vendee, unless there is established an affirmative duty to disclose the existence of a title defect. *American Metal Fabricators Company v. Goldman,* 227 Pa. Superior Ct., 284, 289, 323 A.2d 891 (1974).

Ordinarily, there is no duty on the part of a lender to inspect the mortgaged property to determine that the borrower is obtaining that which he may have been promised by the vendor or that which he believes he is obtaining. Unless some further obligation is assumed, the lender's inspection of the premises to be mortgaged is made only to ascertain whether the property has sufficient value to secure the loan and is made by the lender for its benefit only.

Appellant did not contract with the Bank to review the title; he did not advise the Bank that he intended to rely on its inspection of the property; and no duty existed in law for the Bank to learn of or disclose any matter which appellant might deem a defect. If appellant was defrauded by the Penn DOT easement of which he avers he was unaware, the deception was not perpetrated by the Bank and appellant's remedy must be sought elsewhere.

It is equally clear that appellant was not defrauded by the representation of the Bank's agent that it would recommend 80% financing. Albright's assurance that he would recommend a mortgage in that amount and that his recommendations had never been turned down were no more than the opinion of an agent admittedly acting outside his authority. His power, at best, was only

sufficient to allow him to recommend a loan to the Bank. See 12 U.S.C.A., § 2033(11). The Bank had the absolute right to refuse the mortgage terms requested by the appellant and recommended by its agent. *Todd v. Skelly,* 384 Pa. 423, 428, 120 A.2d 906 (1956). Appellant had a remedy for the denial of his original application which he did not exercise. 12 U.S.C.A. § 2202. Finally, appellant voluntarily accepted the lesser 60% financing offered by the Bank, took its mortgage money and signed the bond and mortgage. Certainly, these circumstances do not establish fraud in the inducement of the mortgage.

The claim that appellant was promised "lenient" treatment in the event of a default is based upon a statement attributed to Albright in the preliminary negotiations to the effect that the Bank had a reputation for being lenient with its lenders. Even if Albright had the authority to commit the Bank, which he did not, this hardly amounted to a commitment that the Bank would not pursue its legal remedies if there was a default. In point of fact, the Bank did not foreclose when appellant went into default for the first time in 1975. It was not until appellant again fell behind in July 1976 and made no payment from then until March 1977 that the Bank foreclosed. There is no basis in fact or law for appellant's claim that he was entitled to leniency and did not receive it.

The remaining Counterclaims were either unsupported by any proffer of evidence, or related to transactions or occurrences which were not part of or incident to the mortgage loan, and therefore properly excluded from consideration by reason of Rule 1148 of the Pa. R.C.P. If any of them are actionable, it must be in an action not tied to this foreclosure as a Counterclaim.

Finally, appellant claims that he was denied the right to make a final argument. The extent to which final argument may be permitted in a civil case is addressed to the discretion of the trial judge. *Commonwealth, ex rel. Frieldman v. Friedman*, 223 Pa. Superior Ct. 66, 71, 297 A.2d 158 (1972). We said in *Friedman* (at p. 71), and it is equally appropriate here:

> " 'A matter such as the length of argument is, of course, almost entirely within the discretion of trial courts . . . .' Here, an experienced trial judge, thoroughly familiar with the law governing the case, concluded that he had heard sufficient argument on the facts during the course of the hearing and any further argument would only be repetitious . . . .
>
> " '. . . and we will not interfere with the discretion of the Court in the matter . . . .' "

In the instant case, the trial court received and considered extensive briefs at the time the Preliminary Objections were ruled upon, and he permitted, indeed encouraged, discussion of the issues by counsel as the trial progressed. If, in his judgment, he had heard enough, we will not interfere.

Affirmed.

APPENDIX B

COMMONWEALTH COURT OF PENNSYLVANIA

June 6, 1979

L. JOAN VENEZIALE, *et al.*,
Appellants,

v.

CHARLES RAUDENBUSH, JR.
and
HARRY ZAMBELLI,
Appellees.

James M. McMaster, Thomas E. Timby & Associates, Newtown, on briefs, for appellants.

Daniel Lawler, Feasterville, on briefs, for appellees.

Before BLATT, DiSALLE and MacPHAIL, JJ.

MacPHAIL, Judge.

On May 12, 1978, Appellants L. Joan Veneziale, Walter Holzworth, Rosemarie Curran, and Michael J. Laputka were enjoined by the Court of Common Pleas of Bucks County from denying to Charles Raudenbush, Jr. and Harry Zambelli, the duly elected township supervisors of Lower Southampton Township, access to the township building and the records, books and files of the township. While Appellants have raised seven issues for our determination, we need address only one.

Pa. R.C.P. No. 1531 authorizes the issuance of a preliminary injunction only after written notice and *hearing* unless immediate and irreparable harm is shown in which event a *hearing* must be held within five days of the issuance of the injunction. In the instant case the court issued the preliminary injunction after written notice and hearing. However, Appellants claim that they were denied their due process rights at the hearing because they were not permitted to cross-examine witnesses nor were they permitted to present testimony. Our reading of the record discloses that indeed the Chancellor did interrupt and prohibit cross-examination by the Appellants and did not permit Appellants to offer testimony on their own behalf.

In his opinion in support of the preliminary injunction the Chancellor characterized the Appellants' contention that they were denied their due process rights as "utterly without merit." We disagree. Whether or not Appellants' position was "illegal, unjust and unconscionable," as the Chancellor found, the Appellants were nevertheless entitled to a fair hearing which encompasses at the very least the right to cross-examine witnesses and present testimony. In *Pubusky v. D.M.F., Inc.*, 428 Pa. 461, 463, 239 A.2d 335, 337 (1968), under nearly identical facts, Justice (now Chief Justice) Eagen wrote:

> "While the testimony at a hearing for a preliminary injunction which seeks only to preserve the status of the parties until the issue is finally determined need not always be as extensive as that at a final hearing, the litigants should not be deprived of their right to fully cross-examine all adverse witnesses, nor of the opportunity to present testimony which is relevant to the question of whether or not the injunction should issue."

Accordingly, the decree granting the preliminary injunction in the instant case must be vacated.

ORDER

AND NOW, this 6th day of June, 1979, the decree entered May 12, 1978 by the Court of Common Pleas of Bucks County granting the preliminary injunction requested by Charles Raudenbush, Jr. and Harry Zambelli is vacated and the case remanded to the Court of Common Pleas of Bucks County for further proceedings.